

BEFORE THE  
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

OTIS CROCKETT  
(Claimant)

PRECEDENT  
BENEFIT DECISION  
No. P-B-128  
Case No. 71-6708

S.S.A. No.

NAVAL SUPPLY CENTER  
(Employer)  
Accounting Branch (Code 52.33)

The claimant appealed from Referee's Decision Nos. SD-UCFE-5599 and SD-UCFE-5613 which held him ineligible for unemployment benefits for former federal employees commencing November 15, 1970 on the ground that he was not unemployed within the meaning of section 1252 of the California Unemployment Insurance Code. The decision also held that the claimant had been overpaid benefits in the amount of \$1,792 and was liable for repayment thereof.

STATEMENT OF FACTS

The claimant was last employed by the above identified agency of the United States Government. This employment terminated on or about June 19, 1970. Subsequent to leaving this work, the claimant commenced appeals action through the United States Civil Service Commission to be returned to work.

Effective November 15, 1970, the claimant filed a claim for unemployment benefits for federal employees and informed the Department that he had appealed the termination of his employment and contemplated being returned to work. On or about June 11, 1971, the claimant was ordered returned to work and on June 30, 1971 was paid retroactive wages in the gross amount of \$6,600.72 covering the period June 20, 1970 through June 10, 1971.

Subsequent to filing his claim for benefits, the claimant received 28 weeks of benefits in the total amount of \$1,792 without the issuance of any formal written determination. It was because of the receipt of this retroactive wage payment that the Department determined the claimant ineligible for benefits under section 1252 of the code and liable for repayment of the amount of benefits received by him.

#### REASONS FOR DECISION

It is first necessary to decide if the Department acted within its authority to redetermine the claimant's eligibility for benefits.

Under the Unemployment Insurance Code the Department must determine the eligibility of a claimant for benefits each week prior to the payment of benefits. When a claimant is found eligible each week, as the claimant in the instant case was, the Department customarily issues no formal determination. However, the act of payment is in effect a determination of eligibility. Such a determination might be identified as a "silent," "oral" or "unwritten" determination.

Article 3 of the code provides for a different type of determination. Section 1328 of this Article provides that under certain circumstances an employer and a claimant shall be properly notified of the Department's determination and an appeal from that determination to a referee may be made within ten days from mailing or personal service of the notice of determination. Section 1331 of Article 3 provides that under certain circumstances a base period employer shall be notified of the Department's determination and may appeal from that determination within ten days from mailing or personal service of the notice of determination. Thus, Article 3 of the code provides for written determinations.

Section 1332(a) of the code provides in pertinent part as follows:

"Any determination provided for in this article Article 3 may for good cause be reconsidered by the department within 15 days after mailing or personal service of the notice of determination. . . ."

This section of the code limits the Department's authority to redetermine a previously written determination to 15 days after the date of mailing or personal service of the notice of determination. There is no such limitation on redetermining an oral or unwritten determination. Since these were the types of determinations made in this case, the Department was within its authority to redetermine the previously made oral or unwritten determinations.

Section 1252 of the Unemployment Insurance Code provides in part as follows:

"An individual is 'unemployed' in any week during which he performs no services and with respect to which no wages are payable to him, or in any week of less than full-time work if the wages payable to him with respect to that week are less than his weekly benefit amount. . . ."

In Appeals Board Decision No. P-B-47, we were confronted with the situation of a claimant who had been wrongfully discharged by his employer and who subsequent to the discharge was returned to his job and received a back pay award. During the period of unemployment, he also received unemployment insurance benefits. In that case we concluded that the back pay award constituted wages allocable to the period following the claimant's discharge and held that, since he received wages in excess of his weekly benefit amount, he was not unemployed during the period to which the back pay award was allocated. That is the situation in this matter and we arrive at the same conclusion.

Section 1375 of the code provides:

"Any person who is overpaid any amount as benefits under this part is liable for the amount overpaid unless:

"(a) The overpayment was not due to fraud, misrepresentation or wilful nondisclosure on the part of the recipient, and

"(b) The overpayment was received without fault on the part of the recipient, and its recovery would be against equity and good conscience."

In the same decision we held that, since the claimant received wages during the same period for which he received unemployment insurance benefits, it would not be against equity and good conscience to require the repayment of these benefits because to do otherwise would unjustly enrich the claimant to the detriment of the public at large. Since the claimant in the instant matter received wages during the same period for which he received unemployment insurance benefits, it would not be against equity and good conscience to require the repayment of the amount overpaid.

DECISION

The decision of the referee is affirmed. The claimant was not unemployed within the meaning of section 1252 of the code as found by the referee. He is liable for repayment of \$1,792 representing benefits overpaid.

Sacramento, California, February 17, 1972.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

CLAUDE MINARD

JOHN B. WEISS

CARL A. BRITSCHGI

CONCURRING - Written Opinion Attached

DON BLEWETT

CONCURRING OPINION

I agree with the conclusion reached in this case. However, I would admonish the Department to proceed with caution in redetermining "silent," "oral" or "unwritten" determinations.

It is significant, I believe, that prior to 1961 section 1332 of the code read in pertinent part as follows:

"Any computation or determination provided for in this article may for good cause be reconsidered by the Department prior to the filing of an appeal therefrom. . . ."

Under this section of the code, the Department made large numbers of "retroactive" determinations resulting in an excessive number of overpayments. Because of this the legislature in 1961 saw fit to limit the Department's authority to redetermine a claimant's eligibility for benefits which had been established by a written determination. Our decision here permits the Department to redetermine a claimant's eligibility for benefits at any time prior to the issuance of such written determination. This power should be used with circumspect. A claimant's eligibility for benefits should not be redetermined unless the Department can establish good cause for so doing. Unless such caution is applied, it is entirely possible that a claimant could be held liable for repayment of 26 weeks or more of benefits on the basis of a mere disagreement in the application of the law.

Once a claimant is held eligible for benefits and receives those benefits, his eligibility should not be redetermined unless there is a compelling necessity to do so.

Finally, it should be pointed out that the eligibility of most claimants is decided without a written determination and under this decision such entitlement

to benefits may at any time be reconsidered by the Department, resulting in exorbitant overpayments being established. Therefore, I call this to the attention of the legislature for possible consideration of limitations on such determinations.

DON BLEWETT